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NOTE AND COMMENT.

THE CHARACTER OF USER IN PRESCRIPTION.—As the possession of the claimant in a case of adverse possession must be shown to have been adverse in order to ripen into title, so also must the user in prescription be shown to have been adverse during the entire prescriptive period. As to the burden of proving the adverse character of the possession in the first case there seems to be doubt whether there is a presumption of adverseness by showing open possession and acts of ownership, or whether there is a burden upon the claimant to go further. See 2 AM. & ENG. ENCY. L. & P. 392, and cases there cited. The usual doctrine would seem to be that it is sufficient for the claimant to prove the fact of possession together with acts of ownership, as for instance, the taking of the profits of the land. Of course in order to acquire title he must show that his possession had the further characteristics of openness, continuity, exclusiveness, etc. But, generally speaking, facts of the nature above indicated are sufficient to show the hostile or adverse character of his possession. As to the situation when the possession has been due to a mistaken belief as to ownership see 11 MICH. L. REV. 57.

The adverse character of the user in prescription causes more trouble.

In prescription there is no taking possession of a parcel of land and exercising of those unequivocal acts of ownership as in adverse possession. The user, of course, must be proved, also that it was open, notorious, continuous, etc. The difficulty arises in determining in a given case, such user being shown, whether it was permissive or adverse. Ordinarily there is no direct evidence showing clearly which it was, and so the question must be determined from the circumstances of the particular case. In a large number of cases it is said that open user for the statutory period is *presumptively* under claim of right, and therefore is adverse. *Carmody* v. *Mulroony,* 87 Wis. 552; *Smith* v. *Pennington,* 122 Ky. 355, 91 S. W. 730, 8 L. R. A. (N. S.) 149; *Barnes* v. *Haynes,* 13 Gray 188; *Hammond* v. *Zelmer,* 23 Barb. 473; *Pavey* v. *Vance,* 56 Oh. St. 162; *Garrett* v. *Jackson,* 20 Pa. St. 331; *Fleming* v. *Howard,* 150 Cal. 28, 87 Pac. 908; *Mitchell* v. *Bain,* 142 Ind. 604; *Cox* v. *Forrest,* 60 Md. 74; *Clement* v. *Bettle,* 65 N. J. L. 675; *Nicholls* v. *Wentworth,* 100 N. Y. 455; *Chalk* v. *McAlily,* 11 Rich. L. 153; *Arbuckle* v. *Ward,* 29 Ut. 43; *Rogerson* v *Shepherd,* 33 W. Va. 307. In Indiana there seems to be a statute to that effect. On the other hand, in *C. B. & Q. R. Co.* v. *Ives,* 202 Ill. 69, where it appeared that the user had been open and notorious for the prescriptive period, the court said in substance that since there was no evidence to show that the user had been hostile the claimant had not made out his case. Similar to the last cited case in the respect referred to are *Railroad Co.* v. *Johnson,* 205 Ill. 598;*Stewart* v. *Andrews,* 239 Ill. 186; *Piano Co.* v. *Forbes,* 129 Ala. 471; *Fish Co.* v. *Dudley,* 37 Conn. 136. In the *Ives* case the very circumstances of the case negatived the hostile character of the user. In other words, the more reasonable explanation of the user was that it was by permission. The statement sometimes made (see note in 8 L. R. A. [N. S.] 149) that open user for the prescriptive period is presumptively under a claim of right, and therefore adverse, is not quite accurate. Perhaps the following is more nearly accurate: open user for the prescriptive period is presumptively adverse unless under the circumstances of the case the more reasonable explanation of the user is that it was by permission. Or, putting it somewhat differently: open, continuous, and notorious user is presumptively adverse, but the presumption may be overcome by the very circumstances of the case showing that the reasonable explanation of the user is that it was throughout permissive. But then the presumption does not help much.

In determining whether the user is explained more reasonably on the ground of permission, or that it was because the claimant had a right, there are involved a question of fact and the exercise of judgment. It would seem to make a big difference over what part of a man's land the right is being exercised. For example, driving across waste land would, or could very reasonably be explained on the basis of permission, while a way over valuable, cultivated lands could be explained in reason, perhaps, only on the basis that the claimant had such a right, for otherwise surely the servient owner would not have sat by quietly. See *Fish Co.* v. *Dudley,* 37 Conn. 136, also *Piano Co.* v. *Forbes,* 129 Ala. 471. In the very late case of *Bruner Granitoid Co.* v. *Lime & Cement Co.* (Mo. App.) 152 S. W. 601, it was held

that a long continued open user of a switch track by the defendant was more reasonably explained on the ground of permission because the plaintiff, across whose lands the switch track in part was located, had during the same time also been using the track. See also *Barber* v. *Bailey*, (Vt.) 84 Atl. 608. R. W. A.

TRUSTS AND COMBINATIONS BASED ON PATENTS.—The extent to which public attention has been directed to the patent laws in the last year caused the recent case of the *Standard Sanitary Mfg. Co. et al* v. *United States*, (1912) 33 Sup. Ct. 9, to be of more than ordinary interest. Suit was brought by the government against one Wayman, sixteen corporations engaged in the manufacture of enameled ware, and officers of these corporations, charging that said defendants had entered into a combination and conspiracy in restraint of trade contrary to the Act of July 2, 1890 (26 STAT. AT L. 209, ch. 647, U. S. COMP. STAT. 1901, p. 3200). In 1908, defendant Wayman, who was secretary of the Association of Enamelled Ware Manufacturers, obtained control of what was known as the Arrott patent on a device for applying the enamelling powder to the iron, which was a great improvement over former methods. This patent had formerly been controlled by the Standard Company. Wayman drew up a license agreement which was to become effective when eighty-three per cent. of the manufacturers subscribed to it, and submitted it to the manufacturers. The license agreement provided that the licensee should be allowed to use the Arrott patent; that he should pay royalties, eighty per cent. of which should be refunded at stated periods if the agreement were strictly observed; that he should sell only to jobbers who signed the jobber's agreement; and that he should abide by the prices, conditions for selling, discounts, etc., fixed by the licensor. The jobber's agreement provided that he should handle only enamelled ware manufactured by licensed manufacturers, and should abide by the re-selling prices fixed by the licensor. A rebate system was provided and breach of the agreements forfeited rebates and the jobber's right to purchase from any licensed manufacturer. Eighty-five per cent. of the manufacturers and ninety per cent. of the jobbers of the country signed the agreements.

The trial resulted in the entry of a decree in favor of the government, from which the defendants appealed, maintaining: (1) that the form of the license followed precedents and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it or to grant it on such terms as he may choose; (2) that Wayman's demand was legal and that therefore payment of the price could not be illegal. The court held that the combination constituted a restraint of trade contrary to the Sherman Law, saying, "The agreements clearly transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law." And comparing the case to *W. W. Montague & Co.* v. *Lowry*, 193 U. S. 38, the court said: "The added element of patent in the case at bar cannot confer immu-